

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



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Application No. 14820, of the Defense Procurement Division on behalf of the Coordination Council for North American Affairs, pursuant to Section 206 of the Foreign Missions Act, for permission to locate a chancery in an R-5-B District at premises 1701 - 18th Street, N.W., (Square 153, Lot 132).

HEARING DATE: July 13, 1988
DECISION DATE: September 7, 1988

ORDER DISAPPROVING APPLICATION

The Foreign Missions Board of Zoning Adjustment has decided to disapprove this application. As is explained below, the basis for the Board's decision is that the site of the proposed chancery is not within an "area, determined on the basis of existing uses, which includes office or institutional issues...." Before reaching the discussion of the reasons for this decision, the Board will address some preliminary matters.

This application was filed on April 5, 1988, and heard on July 13, 1988. Pursuant to D.C. Code Sec. 5-1206 (c)(3) (1988), the final determination of the Board must be made no later than October 5, 1988.

On June 17, 1988, the Dupont Circle Citizens Association filed a motion to dismiss the application on the ground that the Board has no authority to consider an application to locate a chancery in an R-5-B zone district if the Zoning Commission has not designated the site as within the Diplomatic ("D") Overlay District.

In its opposition to the motion to dismiss, applicant suggested that a motion to dismiss "is a nullity" in a rulemaking proceeding.

It may be correct that a motion to dismiss is not an apt characterization of a challenge of the authority of the Board in this rulemaking proceeding. If that is correct, it is equally correct that standing as a party is not a prerequisite for an interested person or entity to present a challenge to the Board's authority to consider the

application. Accordingly, the Board considered the merits of the motion to dismiss, and denied the motion.

The Board does not question the sound planning judgment of the National Capital Planning Commission, the Zoning Commission, or any other agencies which participated in the mapping of Diplomatic zones to implement D.C. Code Section 5-1206. It was reasonable for the Zoning Commission to conclude, as it states in Z.C. Order 509, that "the mapping of the areas [where chanceries may locate in the R-1-A through R-5-B zone districts] will be beneficial to the State Department and foreign governments, because the degree of certainty which will result will allow them to plan more effectively."

This Board is constrained, however, to exercise its authority and responsibility as provided in Section 5-1206 and in light of guiding decisions of the District of Columbia Court of Appeals. The particularly pertinent decisions, Dupont Circle Citizens Association v. BZA, 530 A.2d 1163 (1987) and Embassy of the People's Republic of Benin v. BZA, 534 A. 2d 310 (1987) were decided after the Zoning Commission promulgated Order No. 509. For that reason, the Board requested the Corporation Counsel to advise the Board "whether it has the authority under D.C. Code sec. 5-1206 (b)(2)(B) (1987 Supp.) to determine whether an area which is not within a Diplomatic ("D") zone district is in an area which meets the criteria of the cited D.C. Code provision." By memorandum dated April 8, 1988, Deputy Corporation Counsel Richard L. Augulia advised:

Notwithstanding the D zone district, the Act permits a chancery to be located in areas based on existing uses, which includes office or institutional uses, subject to the disapproval of the... FMA-BZA (D.C. Code § 5-1206 (b)(2) upon application to the FMA-BZA (D.C. Code § 5-1206 (c)(1)). The... FMA-BZA must apply criteria contained in the Act before reaching its final determination (see D.C. Code § 5-1206(d)).

In order to make a final determination through a rule-making procedure, (see D.C. Code § 5-1206(f)) the FMA-BZA must interpret "any other area, determined on the basis of existing uses, which includes office or institutional use". (See D.C. Code § 5-1206(b)(2)(B)). The FMA-BZA must define the relevant area, identify the existing office and institutional uses within the area, determine whether the amount of such uses would qualify the area as within the language of the statute and then, if the finding is in the affirmative, determine on the basis of the six criteria whether the chancery should be permitted to locate there. D.C. Code § 5-1206(d).

The advice of the Deputy Corporation Counsel was accompanied by a well-reasoned analysis, and the Board concurs with the advice that it has the authority and the obligation to decide this application. Accordingly, the Board denied the motion to dismiss the application.

The Board has determined in the circumstances of this application to apply the criteria which guided the Zoning Commission in mapping the D zone in R-1 through R-5-B zone districts. Indeed, the Board finds substantial support for this approach in the land use analysis prepared by Rivkin Associates for the applicant (Ex. 9), in the Statement of the Applicant filed June 29, 1988 (Ex. 39) at pages 6 and 7, and in the Applicant's analysis of the "Eligibility of the area pursuant to Section 206 of the Foreign Missions Act" (Ex. 17) at pages 2 and 3. In all of these documents, applicant relies upon the standard that for an area to be deemed as one "which includes office or institutional uses," at least 1/3 of the existing uses should be office or institutional uses.

This Board agrees that this approach is fair and reasonable. The rationale which was persuasive to the Zoning Commission, as set forth in Order No. 509 is persuasive to the Board. A minimal office presence within an essentially residential area would not reasonably be a premise for further erosion of that area's existing residential character, nor would it be reasonable for this Board to exercise its rulemaking power to alter the character of such an area by allowing a chancery to locate within it.

Nothing before this Board establishes any superior, or even equal, alternative measure, to determine whether an area should be treated as a Sec. 5-1206 (b)(2)(B) area, than the 1/3 of total floor area measure. This latter measure was derived by the Planning Commission and Zoning Commission from a study of the average amount of floor area which is devoted to office and institutional uses in squares which were located in the then existing D overlay zone. In particular, the applicant has not proposed an alternative measure or standard which the Board would conclude is reasonable.

The Board also believes that in the particular circumstances of this application, it is reasonable to treat as the pertinent "area" for review only that portion of Square 153 which is zoned R-5-B. The Board will not enlarge this area by including other squares, or the portion of Square 153 which is zoned SP-1. The latter area is a zone district which is explicitly identified in D.C. Code Sec. 5-1206(b) as one in which a chancery may be located subject to this Board's disapproval.

The larger area which surrounds the immediate area of the application is marked by particularly closely drawn

zone district boundary lines. For that reason, under certain literalistic readings of the word "area," the area in which the proposed chancery would be located could arguably be extended to include the immediately adjacent SP-1 zone district or the reasonably proximate C-2-A zone. But the engrafting of such zone districts onto the area of consideration would also engraft onto the area the matter-of-right or special exception offices which are located in those zones. These mixed-use and office zones, and the included office uses, should not be merged with a residentially-zoned area which both the Zoning Commission and the Congress have legislatively determined to warrant different treatment.

The Board finds particular support for this approach in that Congress itself, in Sec. 5-1206, treats various zone districts as discrete classes of areas, which warrant different treatment. In applying the Congressional statute, it is reasonable for the Board to accord the R-1-A through R-5-B areas the full measure of protection which the Congressional legislation contemplates.

On the basis of Ex. 9, it is evident to the Board that 1/3 of the floor area within the R-5-B zoned portion of Square 153 is not shown to be currently occupied by offices or institutional uses. This conclusion is confirmed by the circumstance that the applicant, perhaps studiously, has omitted any explicit discussion of the existing uses within this area. Nonetheless, Ex. 9 allows the Board to conclude as is set forth above.

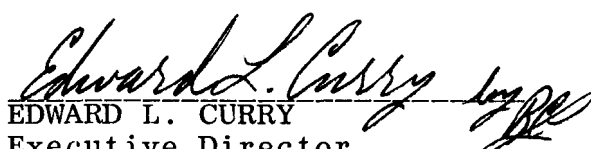
Because the Board has exercised the quasi-legislative authority vested in it under Sec. 5-1206 to determine that the proposed chancery location is not within an area which meets the criteria of Sec. 5-1206(b)(2)(B), it is not necessary to address the criteria of Sec. 5-1206(d).

Based upon the foregoing, it is ORDERED that the application is DISAPPROVED.

VOTE: 3-1 (John G. Parsons, Charles R. Norris, Carrie L. Thornhill to disapprove; Reginald W. Griffith not to disapprove; Paula L. Jewell, not voting, abstaining).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

ATTESTED BY:


EDWARD L. CURRY
Executive Director

FINAL DATE OF ORDER: SEP 23 1988.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT



APPLICATION No. 14820

As Executive Director of the Board of Zoning Adjustment, I hereby certify and attest to the fact that a copy of the Order of the Board in the above numbered case, said Order dated SEP 23 1988, has been mailed postage prepaid to each party who appeared and participated in the public hearing concerning this matter, and who is listed below:

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EDWARD L. CURRY
Executive Director

DATE: SEP 23 1988